NO. 82842-3

SUPREME COURT OF THE STATE OF WASHINGTON

[Pierce County Superior Court No. 06-2-04611-6]

KEVIN DOLAN, *et al.*,

Respondents,

v.

KING COUNTY,

Petitioner.

PLAINTIFFS'/RESPONDENTS' ANSWER TO ATTORNEY GENERAL'S AMICUS BRIEF

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INTRODUCTION

The Attorney General's amicus brief states that he "supports King County on the merits" and adopts "King County's opening Brief of Appellant at 34-58 and King County's Reply Brief at 14-45." AG Br. 2. The reference to the Reply (pp. 14-45) is odd since the AG is apparently adopting the 51-page County Reply that was rejected as too long.

The AG's brief fails to address any of the pertinent authorities, including his own office's formal opinion, AGO 1955-57, No. 267, which this Court expressly adopted in *Good v. Associated Students*, 86 Wn.2d 94, 542 P.2d 762 (1975). Instead, the AG mainly joins in the County's parade of horribles without any support in the record (or outside the record).

ARGUMENT

I. THE LEGISLATURE TWICE SPECIFICALLY INCORPORATED INTO PERS THE COMMON LAW OF EMPLOYMENT RELATIONSHIPS, INCLUDING DRS'S ADMINISTRATIVE INTERPRETATIONS.

A. The Common Law of Employment Relationships Is Well Established and Applies to PERS.

The AG's brief argues that "[t]he respondent class in this case would invite the courts to develop a 'common law' of public employment." AG Br. 5. First, there is nothing novel about the common law determining an employment relationship. Indeed, the common law is an essential part of Washington law, RCW 4.04.10, and it normally defines statutory terms. *N.Y. Life Ins. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975). In particular, the common law of employment is so well

established that whenever the terms "employment," "employer" or "employee" are used in a statute, the U.S. Supreme Court holds that the terms always take their common law meaning unless Congress otherwise defines the terms. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989); *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322-23 (1992). This Court also uses the common law meaning of employment in statutes with the term "employee," unless the Legislature specifies a different meaning in the statute. *Marquis v. Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996).

The common law of the employment relationship focuses on substance, not form, and thus the parties' designation as an "independent contractor" in contracts or other documents is "immaterial" and of "no consequence" if the substance of the arrangement shows the independent contractor designation is erroneous. *Vizcaino v. Microsoft*, 97 F.3d 1187, 1197 and 1198 n. 13 (9th Cir. 1996) (employee benefit claim applying common law of employment relationships under Washington law and federal tax law), *modified en banc,* 120 F.3d 1003 (9th Cir. 1997), *cert. denied*, 524 U.S. 1098 (1998); *enforced by mandamus*, *Vizcaino v. U.S. District* Court, 173 F.3d 713 (9th Cir. 1999), *cert denied*, 528 U.S. 1105 (2000). See also IRS Revenue Ruling 87-41, 1987-1 Cum. Bul 296, 298, cited by *Darden, supra,* 503 U.S. at 324.

There is also nothing novel about applying the common law of employment relationships to "*public employment*" and to PERS. Indeed,

in 1997 the Legislature specifically incorporated the common law of employment relationships into PERS and it also expressly approved the Department of Retirement Systems' (DRS) administrative interpretations applying the common law, including an interpretation that found employees of a nonprofit corporation are public employees who should be in PERS where the nonprofit corporation is an arm and agency or alter ego of a PERS employer. Laws of 1997, Ch. 254 §1(2). And in 2002, the Legislature adopted, for purposes of *all* public employee benefits, definitions of both "employee" and "public employer" that *specifically incorporated the common law.* Laws of 2002, Ch. 155, §§1-2, RCW 49.44.160 and .170.

B. The Common Law Was Part of PERS Before the Legislature Expressly Incorporated It Into PERS.

To understand why the Legislature incorporated the common law into PERS in 1997 and in 2002, one needs to review a bit of history. In 1953, the predecessor agency to DRS determined, using the common law approach, that employees of a nonprofit corporation, the Associated Students of the University of Washington (ASUW), should be in PERS because even though the nonprofit corporation was not officially part of the University, it was in effect an arm and agency of the University.

In 1956, the Attorney General was asked whether that interpretation was correct. The Attorney General provided the Legislature with a formal written opinion, AGO 1955-57, No. 267, in which the Attorney General agreed with the department's administrative

interpretation of the PERS statute. The AG agreed that the employees of a nonprofit corporation, the ASUW, were properly enrolled in PERS because the ASUW is effectively an arm and agency of the University of Washington.[1] The Attorney General thus agreed with the department that the ASUW employees are University employees who belong in PERS because the ASUW is effectively part of the University. Therefore, the ASUW employees are University employees for purposes of PERS, even though they are formally employed by the nonprofit ASUW corporation.[2]

In 1975, this Court specifically agreed with and upheld AGO 1955-57, No. 267, in another context, holding that the nonprofit corporation, ASUW, was an "arm and agency of the university and thus the state." *Good v. Associated Students, supra,* 86 Wn.2d at 97. The students argued that the nonprofit corporation was not an arm and agency of the state "because the university has, in fact, never initiated, altered, or terminated any ASUW activity or program or position." 86 Wn.2d at 99. But this Court agreed with the Attorney General opinion that the University had sufficient control over the ASUW to make it an "arm and

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[1] At that time (1956), "employer" was defined in 41.40.010(5): "'Employer' means every branch, department, agency, commission, board and office of the state admitted into the retirement system." The Legislature subsequently amended the employer definition to clarify that it included "any political subdivision of the state."

[2] DRS continues to apply this administrative interpretation of the employment relationship. For example, in a 1990 PERS eligibility decision, DRS found that employees of a nonprofit corporation, the Washington State University Bookstore, were correctly enrolled in PERS because the nonprofit corporation was an "arm and agency" of the university, a PERS employer. App. 37, FF 108, CP 6606.

agency" because the Regents could theoretically overturn ASUW actions, although it had never happened in practice.[3] *Id.*

The Court also applied the common law of employment relationships to another group of public employees in *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975). The Court held the juvenile court employees have "dual status" as both county and state employees under the common law control test. 85 Wn.2d at 748. The Court found that the "juvenile court employees are hired, controlled and discharged by judges of the court," who directly supervise their work, but they "are compensated by the county." *Id.* Accordingly, "for purposes of hiring, firing and working conditions," the employees "are employees of the court and thus of the state's judicial branch." 85 Wn.2d at 748. But "the employees are employees of the County for . . . matters relating to wages, including medical benefits" because the County is effectively in charge of that area of employment. *Id.* See Resp. Br. 41-43.

In a separate proceeding involving King County, DRS followed the same concept of "joint employment" as *Zylstra,* applying the common law of employment relationships. DRS Examination No. 96-20, *Clark v. King*

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[3] The ASUW Board of Directors is elected by the students (86 Wn.2d at 95) and the ASUW Board had recently amended ASUW's articles of incorporation to remove the authority of the Regents to override ASUW actions. 86 Wn.2d at 98-99. The Court noted that "the students were obviously testing the water in this relationship with the administration," but the Court found that the Regents were still sufficiently in charge because the University controlled the ASUW's income and it also had other practical and legal avenues available to assure that the ASUW acted in accordance with the University's requirements. *Id.* Thus, the ASUW was still an arm and agency of the University, even though the Regents no longer formally had veto power. *Id.*

County, CP 2208-09. There, DRS addressed whether King County had a duty to enroll "contract workers" in PERS. DRS concluded that even if "the workers were properly characterized as employees of the payroll service agency" *an "individual may be simultaneously employed by more than one employer" under "the concept of 'dual employment' or 'joint employment[.]'"* CP 2208 (emphasis added). DRS concluded that regardless of whether the workers were also considered employees of the employing temporary help agency, King County was a "joint employer" responsible for enrolling the employees in PERS. CP 2208-09.

C. The Legislature Specifically Incorporated the Common Law Into PERS in 1997 and Again in 2002, Including DRS's Administrative Interpretation, and the Legislature Required that "Public Employer" Be Defined "Consistent With the Common Law."

In 1997, the Legislature amended the definition of "employee" in the PERS statute to expressly incorporate the common law in determining whether an employment relationship exists. Laws of 1997, Ch. 254, § 10; RCW 41.40.010(12).[4] In amending the PERS statute in 1997, the Legislature expressly adopted both "the long-standing common law of the State of Washington" and "the long-standing Department of Retirement Systems' interpretation of the appropriate standards to be used in determining employee status." Laws of 1997, Ch. 254, § 1(2). Thus, *the Legislature expressly adopted for PERS the common law approach* used

[4] DRS used the common law employment relationship long before the statute was amended in 1997. See pp. 3-5, *supra*.

by the courts and by DRS, which included DRS's administrative interpretation that employees of a nonprofit corporation are public employees who should be enrolled in PERS when the nonprofit corporation is effectively an arm and agency of a PERS employer. It also adopted the common law joint-employer approach that was applied by this Court in *Zylstra* and by DRS in the *Clark v. King County* proceeding.[5]

In 2002, the Legislature *again* adopted both the common law approach and DRS's interpretation of the common law of employment relationships in Laws of 2002, Ch. 155, §§ 1-2, codified as RCW 49.44.160 and -.170. For *all public employee benefits the Legislature adopted the common law of employment relationships*, requiring that substance governs over form. *Id.* Thus, the eligibility of public workers for public employee benefits is not based on "labels," forms, or contracts, but on the "actual work circumstances." *Mader v. HCA*, 149 Wn.2d 458, 475-76, 710 P.3d 931 (2003).

The Legislature specifically required that for all public employee benefits, such as PERS benefits, the term "public employer" should be defined "consistent with the common law." RCW 49.44.170(2)(c). It also required the terms "employee" and "employed" be applied "consistent

[5] Even if the Legislature had not specifically adopted the DRS administrative interpretation, there would have been legislative acquiescence. *Bowles v. DRS*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993) (notice of PERS interpretation by AGO and no legislative action to overturn interpretation); *Longview Fibre Co. v. Cowlitz Co.*, 114 Wn.2d 691, 698, 798 P.2d 149 (1990) (legislative reenactment after receiving notice of the agency's interpretation in an AGO). But here the Legislature did not merely acquiesce; it affirmatively adopted the DRS interpretation.

with the common law," using the same definition of these terms already in PERS. RCW 49.44.170(2)(a).

The common law approach for determining PERS pension eligibility is also used by other states. In a case quite similar to this, *Public Employees Retirement Brd. v. City of Portland*, 684 P.2d 609, 610-11 (Or. App. 1984) (cited by Judge Hickman, App.[6] 74-75), the Oregon Court of Appeals applied the same common law approach as DRS had in the ASUW case, and the Oregon court held that the employees of a nonprofit corporation should be in Oregon's PERS because the nonprofit corporation was in effect an alter ego of Portland.[7] Similarly, in *Metro. Water District v. Superior Court (Cargill)*, 84 P.3d 966 (Cal. 2004), the California Supreme Court held that "contract" workers should be enrolled in California's PERS if they have an employment relationship with the water district under the common law, even though they were formally employed by independent businesses who paid them. *Id.* at 970-71.

Thus, contrary to the AG's argument, the common law approach

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[6] "App." refers to the Appendix to the Respondent's Brief. See Resp. Br. 9, n. 6, explaining findings in the appendix.

[7] Oregon PERS statute's definition of "employer" in 1984 when the decision was made was virtually the same as in Washington. After the 1984 decision, the Oregon Legislature added the term "instrumentalities" to conform the statute to the Oregon Court of Appeals decision. CP 7155-56, Oregon Laws 1985 Ch. 823. In 2001, seventeen years after the 1984 decision, the Oregon Legislature in 2001 Oregon Laws, Ch. 874 (HB 2459) added an additional phrase, which is how King County (Reply Br. 17; Rejected Br. p. 28-29) and the AG (who joins King County's argument, AG Br. 2), now attempt to distinguish the Oregon Court of Appeals' decision, although the County acknowledged below that the phrase was added after the decision and the change was not material. CP 2541-42, n 8.

for determining the employment relationship, which focuses on substance, not on corporate form, labels or paperwork, is a well-established part of the law of PERS.[8] Judge Hickman did not err in applying these principles.

II. THE AG'S (AND COUNTY'S) PARADE OF HORRIBLES IS IRRELEVANT BECAUSE KING COUNTY'S NONPROFIT PUBLIC DEFENSE AGENCIES HAVE NO RESEMBLANCE TO GENUINE INDEPENDENT CONTRACTORS SUCH AS CONSTRUCTION CONTRACTORS.

King County contends that Judge Hickman found that the County defense agencies are arms and agencies of the County using only a made-up "two-part test" – *i.e.*, that government purpose and government funding make a contractor an arm and agency of the government. Co. Br. 45, adopted by AG Br. 2 (see Resp. Br. 55-57, addressing County's mischaracterization of the test applied by Judge Hickman). The County characterizes its control over the public defense agencies as mere "budgetary oversight." Co. Br. 42, adopted by AG Br. 2. The AG joins in King County's mischaracterization of Judge Hickman's decision, saying that Judge Hickman found the defense agencies were arms of King County because the County "pays for services provided and exercises general control over the expenditure of public funds," AG Br. 1, it exercises "prudent controls over the funding provided," *id.* 2, and "the extent of budget control over the contractor," *id.* 5-6. Based on these mischaracterizations of the facts established at trial and the fictitious two-

[8] The AG and the courts also characterize nonprofit corporations as part of the government in other contexts. See Resp. Br. 56, n. 39.

part test that Judge Hickman supposedly employed, the AG joins King County in arguing that a host of government contractors will become PERS employers because they will be considered arms and agencies of the government. AG Br. 4-5.

But the actual differences between genuine contractors for King County, such as building contractors, and King County's public defense agencies are numerous and significant and go far beyond the government purpose, government funding and "general control over the expenditures" – the factors that the AG and King County say the trial court based its decision on. Using construction contractors in King County as an illustration, the differences include but are not limited to:

- County construction contractors are independent for-profit corporations that bid and compete to obtain work. In contrast there is no bidding for King County public defense work and no competition among the nonprofit defense agencies. King County assigns cases and determines the market share (percentage of cases) that each public defense agency receives. App. 20, FF 56.
- County contractors are independent businesses with many clients. King County is not the sole source of revenue for the contractors. In contrast, the public defense agencies are captive corporations, not genuine independent contractors, who receive all or virtually all of their funding from King County. App. 22, FF 60.
- King County does not require its construction contractors to be

nonprofit corporations with only one limited purpose established by the County, nor does it prohibit them from having other kinds of for-profit or non-profit work, as King County does with its public defense agencies. App.21-22, FF 57-58.

- County construction contractors do not participate in the County's annual budget process for County departments, divisions and agencies, as the public defense agencies do, App. 9-10, FF 17-23.
- King County does not have the right or the ability to require its construction contractors to make any changes to their "internal operations that the County deems necessary," as it does with the public defense agencies. App. 32, unchallenged Finding 90.
- King County does not require its construction contractors to fire employees, managers and board members and replace them with individuals approved by the County, nor does it require them to rewrite their articles of incorporation and bylaws to suit the County's purposes. App. 15-19, FF 39-52.
- King County does not require its approval for leases of property by its construction contractors, nor does it initiate receivership proceedings when they lease space that the County does not approve of, nor does it prohibit their purchase of property. App. 20, FF 55.
- King County construction contractors are not subject to and bound by King County's Employee Code of Ethics Ordinance (App. 29, FF 82), not bound by the County's management information system policies,

and they do not have access to public records that is beyond what the public has. CP 657-58, 1754.

- King County does not classify and set the pay rates for the employees of its construction contractors as it does for its public defenders. App. 11-12, FF 25-31.
- King County does not give the employees of its construction contractors the same cost-of-living increase that it gives to other County employees, as it does for the public defense attorneys and staff. App. 12, FF 28.
- King County does not provide the tools and supplies needed by its construction contractors to do their work, as it does with the public defense agencies either by directly providing the equipment or by providing the funding to purchase or lease the equipment. App. 30, FF 85; CP 1751 (¶71); CP 3106 (pp. 104:24-105:12); CP 641 (¶54); CP 2811 (p. 83:13-22). Nor does the County own the equipment that its construction contractors purchase, as it does with its public defense agencies. CP 1751, ¶ 71; CP 2021.
- Construction contractors make a profit and they keep the profits and King County does not maintain that any excess of revenue over expenses that its construction contractors have belongs to the County, as it does with its public defense agencies. CP 2233-34; CP 1737-38, ¶¶17, 20; CP 1271.
- The contract price for King County construction contractors is

determined as part of bids and contract negotiations, not as part of King County's annual budget process for County departments, divisions and agencies. App. 23, FF 61, App. 9-10, FF 17-24.

Neither the AG nor King County have any support for their parade of horribles, *i.e.* "virtually every employee of the many contractors who routinely contract with all levels of government in Washington would be PERS-eligible." Co. Br. 48, adopted by AG Br. 2. This lack of support for King County's purported parade of horribles is not surprising since Judge Hickman found that King County's system, under which it controls the County's four nonprofit public defense agencies, is "unique in the nation." App. 5, FF 8.[9] Judge Hickman found that County public defense agencies are each an "arm and agency" and alter ego (functional equivalent) of King County because of the extensive control that the County exercised over them, not its "general control over the expenditure of public funds," as the AG joins King County in arguing.[10]

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[9] While the County assigns error to this finding (Co. Br. 2), King County introduced the evidence (CP 4095), the plaintiff class concurred (CP 664 ¶89)) and Judge Hickman adopted King County's proposed finding on this point. Compare FF 8 to CP 7349, County's proposed findings. There is no error, but even if there were, the error is both invited and waived by the County.

[10] The common law principle incorporated into PERS – that employees of a nonprofit corporation should be enrolled in PERS when the corporation is in effect an arm and agency of a PERS employer – has existed at least since 1956. The fact that this case is the first applying this long-standing principle confirms that King County's relationship with the public defense agencies is unique. There is no parade of horribles that follows from Judge Hickman's application of this long-standing principle to the unusual facts here as required by RCW 49.44.170(2)(c).

III. JUDGE HICKMAN WAS CORRECT IN FINDING THAT DAY-TO-DAY CONTROL OVER THE DETAILS OF THE DEFENDERS' WORK WAS NOT CRITICAL HERE.

The AG also argues that "direct supervision of the public agency over the individual employees (which is clearly lacking here)" is required for the public defenders to be King County employees for PERS. AG Br. 5. King County makes this same argument, contending that the only factor that matters is "the right to control *the details of the employees' work*, not only as to the result to be achieved, but also the means and methods of which the result is accomplished," and "to establish control, ***the principal must exercise control over the physical conduct of the performance of the service.***" Co. Br. 38, adopted by AG Br. 2 (italics by King County, bold added).

Judge Hickman specifically rejected this argument for several reasons. App. 25-26, FF 64-69; App. 66. First, actual day-to-day control by the County over the agencies is not required for the public defense agencies to be arms and agencies of King County under the common law incorporated into PERS. Neither the Board of Regents in the ASUW case nor the City of Portland had any day-to-day control over the employees of the nonprofit corporations. They had only the theoretical ability to control, which had never been exercised. AGO 1955-57, No. 267; *Good,* 86 Wn.2d at 99; *City of Portland,* 684 P.2d at 611.

Second, public defenders have a constitutional and ethical duty to maintain complete professional independence. *Polk v. Dodson*, 454 U.S. 312, 321-22 (1981). They are thus considered independent contractors for

purposes of their work even when they are officially employees for purposes of pay and benefits. *Id.* Judge Hickman considered the significance of this professional independence by comparing the King County public defense agencies to the Pierce County Department of Assigned Counsel where public defenders are recognized as official County employees and are in PERS. Judge Hickman found that they were the same with respect to internal operations of public defense, with the only difference being corporate form. App. 27-28, FF 73, 75.

Judge Hickman also found, based on the undisputed testimony of the former King County Human Resource Director, that the King County public defense agencies' autonomy in some internal operations is "normal for recognized units of County government and does not distinguish these public defense agencies from other County agencies." App. 26, FF 57; see also App. 26-27, FF 68, summarizing the former director's testimony. Judge Hickman thus found that the public defense agencies were not different in their operations from the Prosecutor's Office and other County agencies. App. 27, FF 69.

After examining the actual relationship between King County and its public defense agencies, Judge Hickman concluded that each was an arm and agency of the County. Because the public defense agencies are each an arm and agency of King County, King County does control the work of the public defenders, at least to the limited extent that professional defense work can be controlled. *Polk, supra,* 454 U.S. at 321-22.

Besides looking at County control over the agencies, Judge Hickman also examined the County control over the public defenders to determine if the County exercised sufficient control to make it a joint employer of the public defenders even if the agencies were genuinely independent and not arms and agencies of King County.

The AG/County's argument about control primarily attacks Judge Hickman's second and alternative approach. But this argument grossly misstates the law, focusing on only one aspect – County control over the physical conduct of the employees' work – as if that were the only thing that matters under the common law of employment relationships.[11] This is not the law.

The PERS statute defines an employee as one "who is providing services for compensation to an employer, unless the person is free from the employer's direction and control over the performance of work." RCW 41.40.010(12). And the Legislature expressly stated that the definition *shall* be interpreted "consistent with the common law." *Id.* Under the common law, a determination of employee status is fact-intensive, not mechanistic, and requires review of "[t]he entire relationship." WAC 415-02-110(2)(a). And "no one factor is determinative." *Id.* at -110(2)(d).

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[11] Oddly, the County also argues that *only* the theoretical right to control matters, not the actual and greater control exercised by the County. (Co. Reply Br. 16, n. 14; rejected Co. Reply at 28, n.16, which the AG is apparently incorporating into the AG Br. 2.) As discussed here, pp. 14-19, control may be found in many ways.

The AG/County's argument that "direct supervision" and "control over the details of the work" is the only thing that matters is incorrect because "no one factor is determinative" and also because it would mean that with a job that requires professional independence, there could never be an employment relationship: no prosecutor, no judge and no public defender could ever be an employee because professional independence is required for the job.

But that is not how the common law determines the employment relationship for professionals. The common law recognizes "[t]he extent of control necessary for a professional to qualify as an employee is less than that necessary for a non-professional." *PEL v. CIR*, 862 F.2d 751, 753 (9th Cir. 1988), citing the seminal case, *James v. Commissioner*, 25 T.C. 1296, 1301 (1956), in which the Tax Court explained:

> [T]he control over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional employees. Yet, despite this absence of direct control over the manner in which professional men shall conduct their professional activities, it cannot be doubted that many professional men are employees.

Thus, in the case of professionals such as prosecutors, judges and public defenders, the entire relationship is examined to determine whether an employment relationship exists, while recognizing that control over the details of the work is left to the professional.

Indeed, DRS applied the common law principles concerning independent professional employees when it determined a part-time

municipal court judge with an outside law practice was a City of Kent "employee" for purposes of PERS. CP 2183, *In Re the Petition of Robert McSeveney*, (9/16/2003). Judge McSeveney signed a contract stating that he was an "independent contractor." Kent could not and did not control Judge McSeveney's work, but DRS determined, by examining all the factors in DRS' WAC 415-02-110, that Judge McSeveney was actually an employee, despite his contractual agreement. Resp. Br. 40.

Here, the public defenders submitted uncontroverted evidence addressing the exact questions set forth in WAC 415-02-110(2)(d) for determining whether the public defenders are "employees" of King County. The class submitted the detailed testimony of the agency directors and others. This is summarized in an 11-page chart, which the witnesses verified, that specifically addressed the questions in WAC 415-02-110(2)(d) in the same format DRS uses. App. 38-48; CP 7309-10, 7327, 7337. The facts summarized in the chart show that King County exercises the same or more control over its public defenders as Pierce County does over its public defenders. In contrast, King County exercises no such control over *genuine* independent contractor lawyers, particularly the attorneys on its assigned counsel panel of defense attorneys. App. 22, FF 59.

The facts summarized in the chart also show that Judge Hickman was correct in finding that "King County is an employer and the plaintiffs are County employees for purposes of PERS." App. 3, 4, FF 100. Indeed,

although the permissible level of administrative control over the professional activities of public defenders is very limited as an ethical and constitutional matter, the facts summarized in the chart, as well as the facts about County control in Judge Hickman's findings, and discussed in Resp. Br. 19-27, show that the County has exercised control at, or perhaps above, what is permitted.[12]

The AG/County's "direct supervision" and "control of details of work" argument is thus erroneous for multiple reasons, as Judge Hickman expressly found. App. 25, FF 64, App. 66.

IV. THE AG AMICUS BRIEF RAISES A PLAINLY WRONG ARGUMENT NOT RAISED IN THE APPEAL BY THE PARTIES THAT THE COURT SHOULD NOT ADDRESS.

The AG argues that Judge Hickman's decision should be reversed because including contractors in the employee pension plan would jeopardize the federal tax status of PERS. AG Br. 6-9. This argument is only made by the amicus, and the Court should thus not address it. *Owner's Ass. v. Satoni, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009). It is also plainly wrong because the public defenders are in fact County

[12] Moreover, the AG/County's argument on "direct supervision" and "control of details of work" ignores the dual or joint employer common law principles incorporated into PERS and applied by PERS in *Clark v. King County*. Judge Hickman found, based on substantial evidence in the record, that King County had control of the public defenders' pay and benefits. App. 11-15, FF 25-33. Indeed, the County argued below that the public defenders received "increased salaries" only after they "negotiated with OPD and lobbied the King County Council." CP 2548. The situation here is thus at minimum no different from *Zylstra*, where the Court held that juvenile court workers were "employees of the county for purposes of negotiated wages, including benefits" due to "wage negotiations with the Board of County Commissioners." *Zylstra*, 85 Wn.2d at 748.

employees, as the Superior Court expressly held.[13]

CONCLUSION

Applying the common law principles incorporated into PERS, Judge Hickman found that the public defenders should be enrolled in PERS for two independent, but related reasons: (1) the four nonprofit King County public defense agencies are each an arm and agency of King County, making King County their employer and the public defense employees King County employees for purposes of PERS; and (2) King County is an employer or joint employer of the plaintiffs and they are County employees for the purposes of PERS because of the control that the County exercises over them directly and through the agencies. App. 37-38, FF 100, and CL 4. Judge Hickman's decision is based on the facts set forth in his Findings and also discussed in his memorandum decision. Judge Hickman's Findings are supported by overwhelming evidence. App. 3-34, 38-48. The Court should affirm his decision.

Respectfully submitted this 18th day of October, 2010.

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[13] Judge Hickman decided that the public defense agencies are part of King County, and that the public defense employees are County employees who should be enrolled in PERS. The employees of the nonprofit corporation ASUW are enrolled in PERS, as are the employees of the nonprofit corporation found to be city employees in the *City of Portland* case, each without jeopardizing the tax status of the plan. Moreover, federal tax law uses the same common law of the employment relationship as PERS. See *Vizcaino* cases, p. 2, *supra*, applying that common law in the context of a federal tax law.

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Answer to Attorney General's Amicus Brief was electronically filed with the Supreme Court in Olympia, Washington, on October 18, 2010.

I further certify that a copy of this document was served by USPS regular mail postmarked October 18, 2010 on counsel for Appellant:

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I further served Mr. Talmadge by e-mail on October 18, 2010, at his e-mail address: Phil@tal-fitzlaw.com.

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I further served Mr. Pharris by e-mail on October 18, 2010, at his e-mail address: JamesP@atg.wa.gov.

I certify under penalty of perjury of the laws in the State of Washington that the foregoing is true and correct.

DATED: October 18, 2010, at Seattle, Washington.

Monica I. Dragoiu, *Legal Assistant*